

First Supplement to Memorandum 94-35

Administrative Adjudication: Exemptions From APA

This Supplement discusses unfinished issues from the February meeting, and a suggestion by Jim Simon of the Department of Social Services.

§ 612.140. Contrary express statute controls**§ 631.010. Application to constitutionally and statutorily required hearings**

Section 631.010 says the new APA "governs a decision by an agency if, under the federal or state constitution or a statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision." Section 612.140 says "[n]otwithstanding any other provision of this division, a statute applicable to a particular agency or decision prevails over a contrary provision of this division."

The Commission noted the California Environmental Quality Act (Pub. Res. Code §§ 21000-2178.1) is not a statute "expressly applicable to a particular agency," but might have procedures that are inconsistent with the draft APA. (The word "expressly" was deleted from this section, but the question discussed here remains.) The Commission asked the staff to consider whether this statute should be preserved, and whether the language of Section 612.140 is adequate to do that. The Commission also asked the staff to look for other statutes of general application that require a hearing and may need to be preserved, such as the California Public Records Act (Gov't Code §§ 6250-6268), the Bagley-Keene Open Meeting Act (*id.* §§ 11120-11132), and the Public Contract Code.

It is unclear whether "findings" made by a public agency under CEQA (see Pub. Res. Code § 21081, set out below) will bring these determinations under the APA as provided in Section 631.010. No hearing procedures are specified in CEQA, so perhaps a special hearing procedure under the APA would be appropriate. On the other hand, factual determinations under CEQA relate only to the narrow issues specified in Section 21081 below. **The staff is inclined to make clear in Section 21081 that agency findings on an environmental impact report need not be made under the APA:**

Pub. Res. Code § 21081 (amended). Findings necessary for approval of project

21081. (a) Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless the public agency makes one or more of the following findings:

(a) (1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.

(b) (2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.

(c) (3) Specific economic, legal, social, technological, or other considerations, including considerations for the provisions of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

(b) In making the findings required by subdivision (a), the public agency is not subject to Division 3.3 (commencing with Section 600) of Title 1 of the Government Code.

Comment. Section 21081 is amended to make clear that public agency proceedings on an environmental impact report under the Environmental Quality Act are not subject to the adjudication provisions of the Administrative Procedure Act.

We will also need to make a search for other comparable statutes. The Bagley-Keene Open Meeting Act (Gov't Code §§ 11120-11132) needs no comparable amendment. It requires meetings to be open, but does not have any hearing requirement. The hearing requirement is provided by other statutes, such as civil service provisions. See, e.g., Gov't Code § 11125.2.

No exemptions from the new APA need to be provided in the Public Contract Code. Twenty-five sections in that code use the word "hearing." Most of these deal with local agency hearings, such as by a county board of supervisors. See Pub. Cont. Code §§ 4114, 20134, 20134.5, 20168.5, 20447-20451, 21001, 21011-21013, and 22044. The draft statute does not apply to local agencies (Section 612.120), so no exemption is needed for these hearings.

At the February meeting, the Commission decided bid protest hearings of the Department of General Services should be subject to the new APA if a hearing is required by statute, and exempt if a hearing is not required. The following sections of the Public Contract Code require hearings that will be subject to the new APA if no exemption is provided: Sections 4107 and 4107.5 (hearing on

objection to substituting another subcontractor for one named in original bid), 4110 (hearing to cancel contract and assess a penalty), 10161 (hearing on agency refusal to prequalify prospective bidder), 10285.2 (hearing before suspending person from bidding on state contract), and 10337 and 10362 (evidentiary hearing by State Personnel Board on contract disputed for noncompliance with merit employment and other principles). Consistent with the Commission's February decision, no amendment to these sections is needed, and they will thus be subject to the new APA and eligible for the special hearing procedure.

Other sections of the Public Contract Code refer to a hearing without requiring it: Sections 10265 (legal action after decision of department or determination of rights by hearing officer), 10285.3 (agency action without further hearing), and 10308 (agency may request hearing before State Board of Control). No amendment of these sections is needed.

§ 648.130. Default

Jim Simon of DSS points out a contradiction in the provisions on mailed service and default: Section 613.210 permits service by mail to the person's last known address. If a statute or regulation requires the person to keep a current address on file with the agency, service at that address is valid, and the person's default may be taken for nonappearance. Under Section 648.130, a default may be set aside for good cause, including failure to receive mailed notice. So although mailed service to the address on file with the agency is good service, the person may have a right to have the default set aside, effectively negating the requirement of keeping an address on file. The staff thinks this is a good point, and would revise Section 648.130 as follows:

648.130. (a)

(d) Within 7 days after service on the person to which the agency action is directed of a decision based on the person's default, the person may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause, including a hearing on the remedy based on a showing by way of mitigation. As used in this subdivision, good cause includes but is not limited to:

(1) Failure of the person to receive notice sent pursuant to Section 613.220. If the person is required by statute or regulation to maintain an address with the agency and failure to receive the notice is because the person did not comply with that requirement,

the agency may consider that fact in determining whether there has been a showing of good cause under this subdivision.

(2) Mistake, inadvertence, surprise, or excusable neglect.

Respectfully submitted,

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